IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN MCGROGAN,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	NO. 01-1342
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY AND PETER GRILLO,	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J. JULY 19, 2002

Plaintiff, Brian McGrogan ("Plaintiff"), filed this civil action premised upon Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. ("Title VII"), 42 U.S.C. §1983 ("1983 ") and the Pennsylvania Human Relations Act, 43 P.S. § 955 et seq. ("PHRA") on March 21, 2001 against his employer, the Southeastern Pennsylvania Transit Authority ("Septa"), and his supervisor, Peter Grillo ("Grillo"). Plaintiff avers that he was subjected to a racially hostile work environment and retaliated against by Grillo for exercising his First Amendment rights while employed by Septa. Presently before the Court is the motion of Defendants, Septa and Grillo, for summary judgment on all of Plaintiff's claims. Since Plaintiff no longer intends to proceed with his Title VII hostile work environment or PHRA claims, those claims will not be discussed in this opinion and summary judgment will be entered in favor of Defendants on those claims. For the following reasons, Defendants' motion is granted and summary judgment will be entered in favor of Defendants on Plaintiff's remaining retaliation claim premised upon 1983.

I. Background

The following facts are taken in the light most favorable to the Plaintiff. Plaintiff is currently employed by Defendant Septa where he has worked for approximately twenty years. Currenty, he maintains the position of Cashier which he has held for sixteen years. Plaintiff alleges that Septa and Grillo retaliated against him for exercising his First Amendment rights.

In 1997, another Septa employee, Ms. Williams, approached Plaintiff and requested his assistance in asserting a sexual harassment complaint against Grillo. Plaintiff did assist Ms. Williams in filing her grievance, and both Septa management and Grillo were aware that Plaintiff assisted Ms. Williams in making her grievance.

Approximately two years later, in June 1999, Plaintiff ran for election to the Executive Board of Transportation Workers Union, Local 234 in the Union Election. Plaintiff ran on the Ropars ticket, a group primarily comprised of Caucasian employees, against the Brookens ticket which was primarily comprised of African-American employees. At sometime in the latter half of June 1999, Plaintiff found that a swastika had been placed upon papers in the Cashier's booth. Plaintiff reported the incident by phone to Mike McKee ("McKee"), Septa's Inspector General.

In August 1999, a flyer was circulated in connection with the union election among Septa employees which was entitled "Divided We Fall." The flyer accused members of the Ropers ticket of being racists and also accused Plaintiff of being friends with an alleged leader of the Ku Klux Klan. Septa promptly removed these flyers. Plaintiff avers that Septa did not investigate either the swastika or the "Divided We Fall" incidents.

On June 22, 2000, Plaintiff found that someone had written "KKK rally" on his personal calendar inside the Cashier's Booth. Plaintiff reported this incident to Septa's Police Department and Septa's Station Manager, Richard Diamond, was sent to Plaintiff's booth to retrieve the calender. Diamond took the original calender and gave Plaintiff a receipt as well as a duplicate copy of the calender. Plaintiff contacted McKee who informed Plaintiff that he was waiting to receive the original calender in order to conduct an investigation. Plaintiff alleges that he contacted McKee at least thirty times regarding the investigation but McKee had not yet received the calendar. Plaintiff then conducted his own investigation and concluded that Grillo was responsible for making the notation on his calender.

II. Summary Judgment Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The court is to determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). In making this determination, a court must draw all reasonable inferences in favor of the non-movant. Meyer v. Riegel Prods. Corp., 720 F.2d 303, 307 n. 2 (3d Cir.1983). A non-movant may not, however, "rest upon mere allegations, general denials, or ... vague statements." Quiroga v. Hasbro, Inc., 934 F.2d 497, 500 (3d Cir. 1991). "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 242. Summary judgment must be granted if no reasonable trier of fact could find for the non-moving party. Id. "[T]he plain language of Rule 56(c)

mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "When the record is such that it would not support a rational finding that an essential element of the non-moving party's claim or defense exists, summary judgment must be entered for the moving party." Turner v. Schering- Plough Corp., 901 F.2d 335, 341 (3d Cir. 1990).

III. Discussion

First Amendment retaliation claims brought under §1983 are analyzed under the burden-shifting analysis set forth by the Supreme Court in Mount Healthy Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). Initially, the plaintiff has "the burden of showing that his constitutionally protected conduct was a 'substantial' or 'motivating' factor in the relevant decision." Id. at 235. Then, once the plaintiff carries his burden, the burden shifts to the defendant to show "by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct." Suppan v. Dadonna, 203 F.3d 228, 235 (3d Cir. 2000)(internal citations omitted). If the defendant is able to meet this burden, then "the constitutional principle at stake is sufficiently vindicated if such employee is placed in no worse a position than if he had not engaged in the conduct." Mount Healthy, 429 U.S. 252, 285.

In the case *sub judice*, Plaintiff first contends that Septa's inaction in investigating the swastika and "Divided We Fall" incidents violated his First Amendment right to run in the Union Election.[1] Plaintiff further avers that Septa's decision not to investigate the two incidents

[1] Plaintiff testified in his deposition that Grillo played no role in the June 1999 incident.

encouraged antagonists of Plaintiff's, thereby "creating a custom of retaliation against Plaintiff for exercising his First Amendment rights." (Pl.'s Mem. of Law at 11). Septa counters that it did in fact investigate Plaintiff's complaint, as well as other complaints regarding similar defacing of union literature, and that a warning was posted in response to all of the incidents. Septa further argues that even if Septa did fail to investigate Plaintiff's complaint, Plaintiff has not shown that Septa failed to investigate his complaint because he was running for office.

The Plaintiff has failed to show any causal connection between Septa's alleged decision not to investigate his complaint and his running for union office. First, Septa did in fact conduct an investigation concerning numerous complaints regarding swastikas found on union literature. After the investigation concluded, Septa circulated a flyer dated July 22, 1999, which warned all employees that such conduct would not be tolerated by Septa. In addition, in May 1999, before Plaintiff's swastika and "Divided We Fall" incidents, Septa had issued a warning and reiterated its policy regarding posting slanderous or demeaning comments about fellow employees in response to the upcoming Union Campaign. Then, after removing all of the offensive literature and investigating the numerous swastika incidents, Septa issued the July warning. Plaintiff never filed a written complaint with Septa regarding these incidents, nor with the Equal Employment Office. Significantly, Plaintiff never filed a complaint with the Union who has its own investigatory and disciplinary process for dealing with such complaints. While Plaintiff alleges that a fellow employee, Craig Holmes, was responsible for the swastika incident, Plaintiff did not file any complaint against Holmes either with Septa or the Union. Plaintiff did not alert the Union about the Union Campaign incidents which took place in June 1999 until February 2001. Therefore, Plaintiff has failed carry his burden since there was no violation of his

First Amendment right to run in a Union election.

Plaintiff next contends that Defendant Septa failed to investigate the June 2000 incident regarding the "KKK rally" written on his calender. Plaintiff avers that Septa failed to investigate his complaint in retaliation for assisting Ms. Williams in filing a grievance against Grillo in 1997, three years prior.

Plaintiff, again, has failed to meet his burden. Septa did conduct an investigation regarding the June 2000 "KKK Rally" incident as this Court has reviewed numerous papers submitted with Defendants' summary judgment motion which includes documentation of Septa's investigation including interviews with Septa employees as well as with the Plaintiff himself. Further, the Court finds no causal connection between the June 2000 incident and Plaintiff's assisting Ms. Williams in filing a harassment grievance three years prior. Accordingly, Plaintiff cannot meet his burden as there was no violation of his First Amendment right.

IV. Conclusion

For all the foregoing reasons, summary judgment is granted in favor of Defendants.

An appropriate Order follows.

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Defendants.	:	

ORDER

AND NOW, this 19th day of July, 2002, upon consideration of Defendants' Motion for Summary Judgment (Dkt. No. 13), and any Responses and Replies thereto, it is hereby **ORDERED** that the Motion is **GRANTED** and summary judgment is entered in favor of Defendants on all of Plaintiff's claims. The Clerk of Court is hereby directed to mark this case as **CLOSED**.

BY THE COURT:

ROBERT F. KELLY, Sr. J.